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No. 265

In the Supreme Court

OF THE

United States

October Term, 1935

UNITED STATES OF AMERICA,
Petitioner,

vs.

RAY KEITH ATKINSON,
Respondent.

OPPOSING BRIEF ON BEHALF OF RESPONDENT

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To the Honorable Supreme Court of the United States:

The question presented, the statutes and regulations involved, and the statement of the case are all fairly set forth in the petition, though it should be stated that there was no special request by the Government to instruct the issue of total and permanent disability in fact out of the case, and such character of disability, as well as that based on paragraph 11-a was submitted to the jury in the charge (R. 131) and the verdict was general, not specifying which character of disability was found. (R. 10.)

ANSWER TO SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals was correct in holding as valid the provision in paragraph 11-a of the contract providing that the permanent loss of hearing of both ears shall constitute total and permanent disability.

2. The Circuit Court of Appeals was correct in holding that the decision in Miller vs. U. S., ... U. S. ....., 79 L. Ed. 478, affirming 71 Fed. (2d) 361, has no application to this case.

ARGUMENT

We submit, in the first place, that petitioner is not in position to ask a reversal of the courts below on the question presented in the petition because in the opinion of the Circuit Court of Appeals it is said:

> "Whether the proof was sufficient to make out a case for the jury also under the general definition of total and permanent disability in the policy, we need not determine, for defendant's motion to instruct was general and we have seen that that request was properly refused. There was no special request to instruct the issue of general total and permanent disability out of the case, separate and apart from the general motion to instruct on the whole case. There was no error of which defendant may complain in submitting that issue to the jury."

In view of the above holding we submit that the question presented as to the validity of Paragraph 11, Section A, of the policy is academic and moot because, it having been held that the trial court properly sub-

mitted to the jury the question of total and permanent disability in fact as well as under Paragraph 11-a, and that in doing so there was no error of which the petitioner might complain, we submit that since the verdict of the jury was general it should be held in accordance with the established rules that the verdict will be attributable to and upheld on any theory or state of facts warranted under the evidence, and, there being substantial evidence that respondent was totally and permanently disabled in fact, the verdict should not be disturbed.

Not waiving the above insistence, we submit further that paragraph 11-a is valid and that the Miller case is not applicable.

The provisions of law relating to term insurance have not been carried into U. S. Code, but started with the Act of October 6th, 1917, Chapter 105, Section 2, 40 Stat. 409, and 514 U. S. Comp. Stat. 1918. It will be seen that said Act provided that the Government "shall grant insurance against the death or total permanent disability of any such person," and limited the time within which it could be applied for, and with reference to the authority of the Director provided, "The Director subject to the general direction of the Secretary of the Treasury shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance."

38 U. S. Code Sections 511, 512, 512-A and 512-B relate to converted insurance, and among other things provide that within a specified period all term insurance shall be converted without medical examination

into such form or forms of insurance as may be prescribed by regulations and as the insured may request, and also they provide it shall contain "such other provisions for the protection and advantage of, and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable."

38 U. S. Code, Section 426, prescribes the duties of the Director, and among other things, provides: "All official acts performed by such officials or employees specially designated therefor by the Director shall have the same force and effect as though performed by the Director in person."

38 U. S. Code Sections 11 and 11-E, which created the Veterans' Administration, substituted the "Administrator" for the "Director" and vested him with the same powers and continued in force all rules and regulations formerly in existence.

The regulations of the Director have the force of law.

Sawyer vs. United States, 10 Fed. (2nd) 416 (C. C. A. 2);

Baker vs. United States, 24 Fed. (2nd) 766 (C. C. A. 5);

United States vs. Lawson, 50 Fed. (2nd) 646 (C. C. A. 9).

Under the clause from Section 512 above quoted, we submit that clause A of paragraph 11 of the policy (R. 29) is entirely reasonable and practicable and similar to those generally found in insurance policies. It is unnecessary to cite cases to sustain this statement because the reports are full of cases containing similar

clauses providing that the loss of certain faculties or members shall be considered total and permanent disability.

In this connection, it is also important to notice that Section 512-B provides that the Director must include a provision that one who is *only* totally disabled for a period of four consecutive months shall be paid total permanent benefits, though it provides that on recovery the payments shall cease. This shows that Congress intended that Government Converted Insurance should be in line with company insurance because such four months presumptive clauses are now generally contained in insurance policies.

38 U. S. Code, Section 512 (Sup.) is the section relating to conversion and provides:

> "for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for refund of premiums, cash, loan, paid-up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations."

It also provides:

> "That no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues for more than 240 months."

We think it clear from the above quoted provision that it was the intention of Congress that the converted insurance should cover total and permanent

disability and also that power was vested in the Director by regulation to provide for all the things mentioned.

It was clearly within the province of the Director to define total and permanent disability.

In Lumbra vs. United States, 290 U. S. 551, 78 L. Ed. 492, the Director's regulation defining general total and permanent disability was under discussion and the authority of the Director was recognized, though it was said that the definition was not an exact one or the sole guide by which such disability is to be construed.

We submit that it was just as valid for the Director to make the additional regulation contained in paragraph 11-a of the policy to the effect that total loss of hearing in both ears should constitute such disability, because under the facts of this case, as shown from the record and the opinion of the Circuit Court of Appeals, respondent is for all practical purposes totally and permanently disabled, and we submit that it is a matter of common knowledge that the average man in respondent's condition with respect to the sense of hearing is for all practical purposes totally and permanently disabled in fact. The cases on disability by reason of loss of hearing are few, but we refer to

McCutchen vs. Pacific Mutual Life Insurance Co. (S. C.), 151 S. E. 67;

Kane vs. Metropolitan Life Insurance Co. (Mo.), 73 S. W. (2d) 826.

In view of the recognition given in the Lumbra case, supra, to the definition of the Director, it would seem that the Government's complaint here is merely that the Director erred in exereising his discretion and power of definition by including loss of hearing as a total permanent disability. Since there is no claim that the Director abused his discretion or power, we believe the matter is not open to the attack made, which amounts really to a question of the exercise of a power given rather than presenting a question of lack of power to exercise such discretion.

Furthermore, since the issuance of the contract containing paragraph 11-a, Congress has passed various amendments to the Act but has not said that said paragraph is wrong nor prohibited it and under the well established rule of practical construction by a Department of the Government, we submit that paragraph 11-a should be upheld on this theory, if on none other.

The Government says that it has found no policy containing the clause making loss of hearing presumptive total permanent disability. However, we believe the court will know that in the insurance field it is almost a universal custom to provide in disability policies that the loss of certain members or senses shall constitute total permanent disability, and this is true also of numerous workmen's compensation laws, and we submit that there is no real reason for excluding loss of hearing from such clauses in policies and that the Director, acting on the authority given him to prescribe the terms of the policy and to include provisions

therein which are "reasonable and practicable," was clearly acting properly in including loss of hearing in the clause.

As to the Miller case, supra, we think it sufficient to point out that in that case it was sought to apply a regulation of the Director as to war risk term insurance retroactively for a period of eleven years and it was held that this could not be done as the power of the Director, if construed as contended for by the veteran in that case, would amount to legislation rather than regulation. And we, therefore, think that case is not applicable here. We believe that Congress has drawn a distinction between the powers of the Director to promulgate regulations with reference to term insurance as distinguished from converted insurance, and that since the regulation in question is reasonable, it should be sustained.

We respectfully submit that the writ should not be granted.

WHEREFORE, respondent prays that the writ be denied or, if it be granted, that the decisions of the courts below be affirmed, and he prays for general relief.

Respectfully submitted,

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